No. 02-182

OCT 23 2002

In the Supreme Court of the United States

STATE OF GEORGIA, APPELLANT

v.

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court erred in its application of established legal standards for determining whether a change in voting practices or procedures results in retrogression that precludes preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

2. Whether the district court's application of settled Section 5 precedent is consistent with the Equal Protection Clause.

3. Whether private parties may intervene in a declaratory judgment action filed under Section 5 of the Voting Rights Act of 1965.

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OPINIONS BELOW

The opinion of the three-judge district court denying preclearance of appellant's state senate plan (J.S. App. 23a-213a) is reported at 195 F. Supp. 2d 25. The opinion of the district court granting preclearance of appellant's amended state senate plan (J.S. App. 1a-22a) is reported at 204 F. Supp. 2d 4.

JURISDICTION

The three-judge district court entered its judgment denying preclearance on April 5, 2002, and its judgment granting preclearance of the amended plan on June 3, 2002. Appellant filed a notice of appeal from both judgments on June 4, 2002. 28 U.S.C. 2101(b). This

Court has jurisdiction pursuant to 42 U.S.C. 1973c and 28 U.S.C. 1253.

STATEMENT

1. Appellant, the State of Georgia, is a covered jurisdiction subject to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. See 28 C.F.R. Pt. 51 App. Under Section 5, a covered jurisdiction may not implement changes in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," unless it (1) has obtained judicial preclearance by means of a declaratory judgment from the United States District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or (2) has submitted the proposed change to the Attorney General for administrative preclearance and the Attorney General has not interposed an objection. 42 U.S.C. 1973c. An action for a declaratory judgment under Section 5 is heard and determined by a three-judge district court. 42 U.S.C. 1973c; 28 U.S.C. 2284(a). In a declaratory judgment action under Section 5, the district court cannot preclear a proposed voting change unless the covered jurisdiction proves that the change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (quoting *Beer* v. *United States*, 425 U.S. 130, 141 (1976)). The jurisdiction's existing plan—the status quo—is the benchmark against which the retrogressive effect of a proposed voting change will be measured. *Ibid.*

2. Following the 2000 census, appellant adopted redistricting plans for electing members of the United States House of Representatives and the Georgia Senate and House of Representatives. J.S. App. 42a. In October 2001, appellant filed suit in the District of Columbia requesting preclearance of its proposed redistricting plans. *Id.* at 23a. The United States did not oppose the congressional and state house plans, but did oppose the state senate plan on the ground that the reduction of black voting age population and black registered voters' population in districts 2, 12, and 26 would have a retrogressive effect prohibited by Section 5. Under the pre-existing benchmark plan, the black voting age population in those districts was 54.94% or higher, and the population of black registered voters was 52.48% or higher. Appellant's proposed plan reduced the black voting age population to 50.39% or lower and the black registered voters population to 48.42% or lower. *Id.* at 74a. Thus, appellant proposed to reduce black registered voter majorities in all three districts to below 50%. Moreover, appellant proposed to remove black voting age population out of districts 2, 12, and 26, notwithstanding the fact that those districts were all underpopulated.[1] All three districts were also

[1] Those calculations of voting age population are based on the United States' *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c*, 66 Fed. Reg. 5412 (2001), which counts as black all non-Hispanic individuals who, in the 2000 Census, identified themselves only as black, or as black and white, but not as black and another minority race. Appellant, however, calculated the relevant voting age population by counting all black multi-racial Hispanic and non-Hispanic individuals as black. In considering the plan's retrogressive effect, the district court followed the United States' recommendation that it refrain from choosing one measurement over the other and instead, "consider[ed] *all* the record information, including total black population, black registration numbers and both BVAP [black voting age population] numbers."

marked by the presence of racially polarized voting in local elections. J.S. App. 144a.

The district court subsequently allowed four African American citizens of Georgia to intervene to challenge the legality of the entire redistricting plan. J.S. App. 214a-219a. The court, however, denied the motion to intervene of Michael B. King, an African American resident of Senate District 44, as untimely. *Id.* at 31a-35a.[2]

3. Following trial, the district court granted preclearance for appellant's congressional and state house redistricting plans, but denied preclearance for three districts in the state senate redistricting plan. J.S. App. 23a-150a. With respect to the state senate plan, the district court ruled that appellant "failed to demonstrate by a preponderance of the evidence that the reapportionment plan for the State Senate will not have a retrogressive effect." *Id.* at 144a-145a. In particular, appellant failed to prove, in light of the evidence of racially polarized voting in senate districts 2, 12, and 26,

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J.S. App. 117a. In any event, the reduction in black voting age population is slightly greater under appellant's method of calculation:

Dist.	Benchmark BVAP (Ga.)	Proposed BVAP (Ga.)	Reduction (Ga.)	Benchmark BVAP (U.S.)	Proposed BVAP (U.S.)	Reduction (U.S.)
2	60.58%	50.31%	10.27%	59.98%	49.81%	10.17%
12	55.43%	50.66%	4.77%	54.94%	50.22%	4.72%
26	62.45%	50.80%	11.65%	61.93%	50.39%	11.54%

Id. at 74a, 122a.

[2] King has appealed the district court's denial of intervention, as well as the merits judgment of the underlying action. See *King* v. *Georgia*, Nos. 02-125 & 02-425.

that the reduction of black voting age population to bare majorities or less would not significantly diminish minority voting strength in those districts.

a. In so holding, the district court found unpersuasive the testimony of appellant's expert statistical witness, Dr. Epstein. That testimony suggested that the "point of equal opportunity" for black voters to elect a candidate of their choice is a black voting age population of 44.3% or higher in an open-seat election, and 56.5% if a white incumbent is in office. J.S. App. 92a-93a. The court first noted that Dr. Epstein relied on a statistical technique that "no court has relied on" in reviewing reapportionment plans. *Id.* at 90a. Beyond that, the court explained that Dr. Epstein's "retrogression analysis" consisted simply of comparing the number of districts under the benchmark and proposed plans that have black voting age populations greater than 44.3%. *Id.* at 96a-97a. The court emphasized that Dr. Epstein's report did not consider the effect of reducing black voting age population in majority-minority districts to bare majorities, *ibid.*, and that Dr. Epstein "failed even to identify the decreases in [black voting age population] that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice," *id.* at 121a.

Dr. Epstein, moreover, acknowledged that a drop in a district's black voting age population would result in a diminished likelihood of success for black voters' preferred candidates. J.S. App. 122a. For example, a 5.7 percentage point decrease in a district's black voting age population, from 50% to 44.3%, would result in a 25% decline in the likelihood that a candidate of choice

would be elected. *Ibid.*[3] According to appellant's method of calculation, the court found, the net reduction in black voting age population in districts 2, 12, and 26 is 10.27%, 4.77%, and 11.65%, respectively. *Ibid.*

The court further found that appellant's expert report "necessarily subsume[d] information about racial voting patterns and voter turnout." J.S. App. 127a. Beyond those assumptions, appellant "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in individual districts across the State." *Id.* at 133a.

The United States, by contrast, provided an expert report that documented racially polarized voting patterns in each of the contested state senate districts. J.S. App. 99a, 133a ("the United States has produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts"). The United States' expert further testified that evience of white voter crossover to support African American candidates in some elections did not dispel the racially polarized voting in local elections, such as for state senate seats. The expert explained that "the level of crossover voting tends to be considerably higher in these [statewide] elections than in the senate and other elections involving local candidates." *Id.* at 101a-102a, 128a (citation omitted). Indeed, even appellant's expert had uncovered "very high levels of polarization" in a senate election. *Id.* at 128a. The court accordingly found that, "[i]n light of the problems with the State's own statistical evidence and its inability to cast

[3] A similar decline in black voting age population, however, would have less effect if the percentage of black voting age population were significantly higher. J.S. App. 123a.

significant doubt on that presented by the United States, we are compelled to conclude that the evidence of racial polarization suggests the likelihood of retrogression." *Id.* at 133a.

Appellant also placed weight on the near unanimous support of African American legislators for the proposed redistricting plan. The court concluded, however, that their testimony was "far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*." J.S. App. 135a.[4] More relevant to the question of regressive effect, the court found, was the testimony about minority voting strength in all three districts, and the highly polarized voting patterns and history of racially-charged political campaigns in districts 2 and 12. *Id.* at 136a-138a.

The court also found "unavailing" appellant's argument that, because population had to be added to each of the contested districts following the 2000 census, a reduction in black voting age population was necessary to comply with the equal protection principle of one person-one vote. J.S. App. 124a. The court found that appellant failed to produce any evidence in support of that contention. Indeed, the court found that the evidence revealed that "the State actually removed some majority African American precincts from each of these [contested] districts," a decision that, in the court's

[4] Appellant's continued emphasis on the "near unanimous support" of black legislators for the proposed state senate plan, see, *e.g.*, J.S. 10-11 n.2, overlooks the district court's finding that the United States "presented extensive evidence of African American Senators' misgivings about the Senate plan." J.S. App. 134a. Indeed, the court found that two black legislators voted against the plan, and that the others only voted for it because they were afraid of losing African American chairs should the Democratic Party cease to be a majority in the state senate. *Id.* at 46a.

view, "cast[] doubt on [the State's] cries of inevitability." *Ibid.* The court further found that there were alternative, reasonable plans that both would have comported with the constitutional principle of one person-one vote and would have allowed the retention of greater numbers of black voters in the disputed districts. *Id.* at 125a.

b. Based on those factual findings, the district court ruled that appellant had failed to prove that its proposed senate redistricting plan would not result in retrogression. The court explained that, under this Court's precedents, "[p]reclearance must be denied if a proposed change abridges the right to vote relative to the status quo." J.S. App. 106a (internal quotation marks omitted). Preclearance, in other words, requires "nothing more than a determination that the voting change is no more dilutive than what it replaces." *Id.* at 107a (quoting *Reno* v. *Bossier Parrish Sch. Bd.*, 528 U.S. 320, 335 (2000)). Accordingly, the court explained,

> Section 5 cases have focused almost exclusively on evaluating whether a proposed change would leave minority voters in a "worse" position than under the existing plan. The [Supreme] Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities. Nor does Section 5 require that redistricting plans ensure *victory* for minority preferred candidates. Rather, it is a mandate that "the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."

J.S. App. 107a-108a (citations omitted). The court further explained that its "analysis—while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur." *Id.* at 111a. "In particular, the level of racially polarized voting, or the degree to which there is a correlation 'between the race of a voter and the way in which the voter votes,' sheds light on whether a decrease in districts' minority populations will produce an impermissibly retrogressive effect." *Ibid.* (citation omitted). Accordingly, "if racially polarized voting persists in an area and its electoral history demonstrates that minority voters' preferences diverge greatly from those of non-minority voters, a decrease in [black voting age population] may translate into a lessening of minority voting strength." *Ibid.*

Applying those standards, the court undertook "a searching review of the record," J.S. App. 142a, but was "not persuaded," *id.* at 144a, by appellant,

> on the basis of the evidence before it, that minority voting strength will not be significantly diminished by the proposed redistricting. The plan proposes to decrease the [black voting age population] in existing majority-minority districts such that they would constitute only bare majorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these changes would not be retrogressive. The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in [black voting age population].

Id. at 144a-145a. Appellant's expert testimony was unhelpful, the court explained, because "that analysis fails to account for variations in levels of racial polarization," and appellant "presented no other evidence to

persuade us that voting in future Senate races in the contested districts will not be racially polarized." *Id.* at 133a.

The district court specifically rejected appellant's contention that "the retrogression inquiry is limited to determining whether reapportioned districts provide minority voters with an 'equal opportunity' to elect minority candidates." J.S. App. 111a-112a.

> The Supreme Court has repeatedly held that, while a Section 2 suit compares the change in voting procedures to an ideal, fair benchmark, Section 5 actions must compare the proposed plan to the existing opportunities to elect candidates of choice. Thus, as already discussed, our analysis must focus, not on the level of [black voting age population] that will ensure a "fair" or "equal" opportunity to elect preferred candidates, but on whether the proposed changes would decrease minority voters' opportunities to elect candidates of choice.

Id. at 119a-120a (citation omitted). Accordingly, appellant's expert testimony "was woefully inadequate" because it "was crafted to predict a 'point of equal opportunity' that has little relevance to the retrogression inquiry mandated by Section 5." *Id.* at 143a; see also *id.* at 121a (appellant's expert "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive").

c. Judge Oberdorfer dissented, J.S. App. 161a-212a, on the ground that the plan, despite its retrogression, preserved for minorities "a fair or reasonable opportunity to elect candidates of choice." *Id.* at 189a.

4. Six days after the district court ruled, a revised state senate plan was passed by the Georgia General Assembly and signed into law by the State's governor.

J.S. App. 2a. The United States advised the district court that it would not oppose the plan as violating Section 5 of the Voting Rights Act. The intervenors, however, continued to oppose the revised plan. *Id.* at 2a-3a.

On June 3, 2002, after the parties submitted a stipulated record, the district court precleared appellant's revised state senate plan. J.S. App. 1a-22a. Because the revised plan did not strip the black voting age population in districts 2, 12, and 26 to bare majorities, the court concluded that "[t]he likelihood that retrogression will result from the 2002 plan is significantly less." *Id.* at 14a.

DISCUSSION

Appellant seeks plenary review of the district court's holding that it failed to meet its burden of proving that the proposed state senate plan would not have a retrogressive effect prohibited by Section 5 of the Voting Rights Act. Appellant, however, does not challenge any of the court's factual findings, such as the plan's decrease in black voting age population, the existence of racially polarized voting, the underpopulation of the contested districts, or the deficiencies in appellant's limited statistical evidence. Instead, appellant hinges its request for plenary review (J.S. 18-23) on the argument that Section 5 of the Voting Rights Act is satisfied as long as minorities are afforded an "equal opportunity" of electing candidates of their choice, regardless of any resulting retrogression in minority voting strength. Because that argument conflates the distinct standards and purposes of Sections 2 and 5 of the Voting Rights Act (42 U.S.C. 1973, 1973c), contrary to established precedent, the district court's decision should be summarily affirmed.

Beyond that, appellant's contention that the district court's decision trenches upon the equal protection principle of one person-one vote is belied by appellant's prompt enactment of a revised state senate plan that satisfies the Equal Protection Clause, both by complying with the principle of one person-one vote and by avoiding bizarrely shaped districts based primarily on race. Finally, nothing in the statute nor this Court's precedent supports the State's argument that private parties may not intervene in a Section 5 declaratory judgment action.[5]

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[5] While appellant's decision to seek preclearance of a new plan, following the district court's decision, and to use the new plan for the August and November 2002 elections raises the specter of mootness, on balance we believe that use of the plan does not moot the case. The new plan was adopted by the Georgia legislature because the district court denied preclearance of the proposed plan and adoption of an interim plan was necessary to conduct upcoming elections. Were the adoption of such an interim plan to moot a case, covered jurisdictions would be left with the Hobson's Choice of either delaying elections until this Court disposes of its appeal or quickly preclearing a new plan and forfeiting its right to appeal. We do not believe that traditional mootness principles or the purposes of Section 5 of the Voting Rights Act requires such a result. In any event, resolution of this case is necessary in order to ascertain the legality of using the interim plan for future elections. Although implementation of the interim plan is currently appropriate, the interim plan could lose legal force if this Court were to reverse the district court's decision and order preclearance of the original plan. In that case, this Court's decision to reverse the decision below would establish that the interim plan was used only due to the district court's legal error. Were that to occur, continued use of the interim plan, in our view, could be improper, and the original plan, if it complied with Section 5, would then become the new benchmark for measuring retrogression. See 28 C.F.R. 51.54(b)(1) ("[T]he comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction."); cf. *Abrams* v. *Johnson*, 521 U.S. 74, 97 (1997) (a plan held to be an unconstitutional racial gerrymander should not serve as the Section 5 benchmark, even though it was previously precleared and implemented). Of course, upon affirmance of the decision of the district court, the interim plan will become the new benchmark. 28 C.F.R. 51.54(b)(1); see also *Texas* v. *United States*, 785 F. Supp. 201, 204 (D.D.C. 1992) (holding that an interim court-ordered plan, crafted and implemented for upcoming elections when the State's proposed plan was held invalid, was the new benchmark for evaluating a subsequently enacted plan). Because the parties thus have a legally cognizable interest in the resolution of this issue, the appeal remains justiciable. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969).

I. THE DISTRICT COURT PROPERLY APPLIED ESTABLISHED STANDARDS TO EVALUATE APPELLANT'S COMPLIANCE WITH SECTION 5's MANDATE AGAINST RETROGRESSION

Appellant contends (J.S. 20-23) that the district court committed legal error in denying preclearance under Section 5 of the Voting Rights Act, notwithstanding the uncontested retrogression in minority voting strength, because its proposed plan satisfies Section 2 of the Voting Rights Act by allegedly affording minority voters an "equal opportunity" to elect candidates of their choice. This Court, however, has "consistently understood" that Section 2 and Section 5 of the Voting Rights Act "combat different evils and, accordingly, [] impose very different duties upon the States." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) (*Bossier I*). The two Sections "differ in structure, purpose, and application." *Holder* v. *Hall*, 512 U.S. 874, 883 (1994).

Section 2 bars all States and their political subdivisions from maintaining any "voting qualification or prerequisite to voting or standard, practice, or procedure" which "results in a denial or abridgement of the

right * * * to vote on account of race or color." 42 U.S.C. 1973(a). A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [racial minorities] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

By contrast, Section 5 applies only to certain States and political subdivisions, *Bossier I*, 520 U.S. at 477, and its purpose "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. * * * Congress therefore decided, as the Supreme Court held it could, "to shift the advantage of time and inertia from the perpetrators of the evil to its victim," by "freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory."

Beer, 425 U.S. at 140 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57-58 (1975) (internal quotation marks and citations omitted)); accord *Bossier I*, 520 U.S. at 477.

In short, while a Section 2 case inquires whether plaintiffs "have an equal opportunity to participate in

the political processes and to elect candidates of their choice," *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (internal quotation marks and citations omitted), a preclearance action under Section 5 "requires a comparison of a jurisdiction's new voting plan with its existing plan," *Bossier I*, 520 U.S. at 478, "to determine whether retrogression would result from the proposed change," *Holder*, 512 U.S. at 883. Section 5 thus mandates that "the ability of minority groups * * * to elect their choices to office" not be diminished, *Beer*, 425 U.S. at 141, not (as Section 2 requires) that the opportunity be "equal[]" to that of "other members of the electorate," 42 U.S.C. 1973(b). Section 5 "prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) (*Bossier II*).

Appellant's challenge to the district court's decision accordingly asks the wrong legal question. Appellant does not seek review of the court's findings of fact concerning the decrease in black voting age population, the existence of racially polarized voting, the absence of offsetting gains for minorities under the plan, or the ineffectiveness of appellant's statistical evidence. Nor does appellant seek review of the application of established Section 5 retrogression precedent to those facts. Appellant, in short, does not deny that its plan results in retrogression. Appellant argues only that such retrogression—which always has been regarded as a violation of Section 5 of the Voting Rights Act—should be excused or tolerated because of appellant's compliance with a separate legal standard—Section 2 of the Voting Rights Act. This Court, however, specifically warned against conflating the standards for compliance with Section 2 and Section 5 in *Bossier I*. In that case, the Court rejected the converse of appellant's

argument—the contention that a Section 2 violation necessarily established a violation of Section 5:

> [R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

520 U.S. at 477. It makes no more sense to argue, as appellant does, that the absence of a Section 2 violation necessarily signifies the absence of a Section 5 violation. "Doing so would, for all intents and purposes, replace the standards for [Section] 5 with those for [Section] 2." *Ibid.*[6] That does not mean that evidence suggesting the lack of a Section 2 violation is irrelevant in the Section 5 analysis; it just means that, contrary to appellant's contention, it is not dispositive of the Section 5 inquiry.

Finally, appellant's reliance (J.S. 21) on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), is misplaced. That case involved requested preclearance for a

[6] See also J.S. App. 112a n.35; *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 634 (D.S.C. 2002) ("[Section] 2 looks beyond the status quo to ensure that a redistricting plan affords blacks an equal opportunity to elect the representatives of their choice as white voters enjoy. Section 5, in contrast, maintains the status quo. It only prevents 'backsliding' in those jurisdictions subject to its requirements by prohibiting the implementation of any proposed voting change that has been enacted for a retrogressive purpose, or that has a retrogressive effect on minority voting strength. Section 5 * * * 'mandates that the minority's [existing] *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions.'") (citations omitted).

proposed annexation that would have reduced the black population of the City of Richmond from 52% to 42%. This Court concluded that, although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, it did not violate Section 5 so long as the system of representation fairly reflected the strength of the black community after annexation. *Id.* at 371. That holding, however, was "nothing more than an *ex necessitate* limitation upon the effect prong *in the particular context of annexation*—to avoid the invalidation of all annexations of areas with a lower proportion of minority voters than the annexing unit." See *Bossier II*, 528 U.S. at 330-331 (distinguishing *City of Richmond*, 422 U.S. at 371) (emphasis added); see also *id.* at 330 ("[*City of Richmond*'s] interpretation of the effect prong of § 5 was justified by the peculiar circumstances presented in annexation cases."). This case does not involve an annexation. Accordingly, as in *Bossier II*, this Court should decline "to blur the distinction between § 2 and § 5 by 'shift[ing] the focus of § 5 from nonretrogression to vote dilution'" and the equal opportunity of minority voters. 528 U.S. at 336 (quoting *Bossier I*, 520 U.S. at 480).

II. THE DISTRICT COURT'S APPLICATION OF ESTABLISHED SECTION 5 PRECEDENT IS CONSISTENT WITH EQUAL PROTECTION PRINCIPLES

Appellant argues (J.S. 23-26) that the district court's interpretation of Section 5 "require[s] the drawing of supermajority minority legislative districts in order to create safe seats," J.S. 23, and that this interpretation of Section 5 violates the Equal Protection Clause, J.S. 25-26. The district court made no such holding. The district court simply held that appellant was unable to

prove that its reduction of black voting age population in each of the proposed state senate districts to bare majorities would not, in light of the history of racially polarized voting, have a retrogressive effect on minority voting strength. J.S. App. 144a-145a. In so holding, the district court properly measured the proposed state senate plan against the existing senate plan. Preclearance, therefore, required only that appellant not materially diminish the existing level of black voting age population; it did not *require* a super-majority. See *City of Lockhart* v. *United States*, 460 U.S. 125, 135 (1983) (finding no retrogression where a voting change maintained, rather than increased, the degree of discrimination against minority voters).

Beyond that, the district court's ruling did not pronounce any novel rules of law mandating super-majority districts. To the contrary, the court's ruling was "fact-intensive," and it "carefully scrutinize[d]" the particular "context in which the proposed voting changes will occur." J.S. App. 111a. Furthermore, the court emphasized that:

> The mere fact of dilution, the spreading out of minority voters, is not unlawful in the Section 5 context, at least to the extent that it does not lead to a palpable decrease in minority voting strength. * * * Accordingly, contrary to the fears expressed by plaintiff, the Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power.

Id. at 114a (citation omitted).

The court explained that the operation of Section 5 in that traditional manner does not force appellant "to choose between complying with the Equal Protection[] Clause and the Voting Rights Act." J.S. App. 125a. That is because a decrease in black voting age population, which might be necessitated by the principle of one person-one vote, alone "is not enough to deny preclearance to a plan under Section 5." *Ibid.* "[R]etrogression concerns are implicated [only] when it appears that the numerical changes may diminish effective minority voting power." *Ibid.* Accordingly, the district court made clear that appellant "is free under Section 5 to reduce [black voting age population] levels in a district in order to bring that district into compliance with the Fourteenth Amendment, so long as in so doing it does not limit the ability of the remaining minority voters to elect candidates of choice." *Id.* at 125a-126a.

For that same reason, appellant's companion argument (J.S. 25) that the district court's ruling "dictates an inexorable 'ratcheting up' process," under which States lose the authority to make reasonable redistricting judgments, lacks merit. Indeed, the fact that appellant was able to craft a revised state senate plan, unopposed by the United States and precleared by the court, that retained sufficiently higher levels of black voting age populations in all three districts, see J.S. App. 1a-22a, demonstrates that appellant is capable simultaneously of satisfying its obligations under Section 5 and the Equal Protection Clause.

III. PRIVATE PARTIES MAY INTERVENE IN A SECTION 5 DECLARATORY JUDGMENT ACTION

Under Section 5, covered jurisdictions may choose among two methods of obtaining preclearance: they

can submit the proposed change to the Attorney General for administrative preclearance, or they may seek a declaratory judgment from a three-judge district court in the District of Columbia. 42 U.S.C. 1973c. In *Morris* v. *Gressette*, 432 U.S. 491 (1977), this Court held that, when administrative preclearance is pursued, private parties may not seek judicial review of the Attorney General's failure to object to a proposed change. *Id.* at 504-505.

Appellant asks this Court (J.S. 26-28) to hold that, when States pursue judicial preclearance, the Attorney General alone is the defendant and private parties may not intervene in the litigation. Appellant, however, identifies nothing in the text of the Voting Rights Act that denominates the Attorney General as the exclusive defendant in a declaratory judgment action or that otherwise precludes intervention. By eschewing administrative preclearance, moreover, appellant opted to have its compliance with Section 5 reviewed by a federal district court, whose operation is subject to the Federal Rules of Civil Procedure, including the rules governing intervention. Fed. R. Civ. P. 24.[7]

Appellant's argument that the intervenors lack standing is similarly without merit. Appellant relies (J.S. 28-30) heavily on the standing analysis undertaken in *United States* v. *Hays*, 515 U.S. 737 (1995), and other cases involving equal protection claims made pursuant to this Court's decision in *Shaw* v. *Reno*, 509 U.S. 630

[7] Indeed, the district court's grant of intervention in this case is similar to the intervention that occurred in *City of Richmond*, *supra*, where the City of Richmond sought a declaratory judgment that a proposed annexation did not have a prohibited retrogressive effect. Although the Attorney General indicated approval for the plan, a group of residents who opposed it were permitted to intervene and independently pursue the litigation. 422 U.S. at 366-367.

(1993). Those cases are inapt. Equal protection claims turn upon the existence of an individual right under the Fourteenth Amendment not to be included or excluded from a specific district based predominantly upon an individual's race. See, *e.g.*, *Hays*, 515 U.S. at 739 (explaining that the plaintiffs must show that "they, personally, have been subjected to a racial classification"). Section 5 cases, by contrast, involve the comparison of two plans to ascertain whether there is retrogression in the position of racial minorities in any district with respect to their effective exercise of the electoral franchise. *Holder*, 512 U.S. at 883-884. Accordingly,

> whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district's boundaries necessarily affects neighboring districts. Furthermore, the removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district.

J.S. App. 30a. In short, the removal of black voters from a majority-minority district constitutes "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical" and that also is redressable by the courts. *Hays*, 515 U.S. at 743. The Jones intervenors, therefore, had standing to challenge appellant's proposed state senate plan. And, in any event, because the validity of the proposed plan was challenged by the United States, affirmance of the judgment rejecting that plan would be appropriate regardless of whether the intervention should have been allowed.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying preclearance of appellant's state senate plan should be summarily affirmed.

Respectfully submitted.

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